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Citations

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION—DANVILLE WORKS, *Petitioner*
v.
NATIONAL LABOR RELATIONS BOARD
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred twenty-two affiliated labor organizations with a total membership of approximately thirteen and one-half million working men and women, files this *amicus* brief with the consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

As the court below recognized, it is generally agreed that "the [National Labor Relations] Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way" (A. 127). The primary defect of these remedies is that they encourage violations by allowing employers to benefit from illegal refusals to bargain. In the instant case the Board, prodded

by the force of circumstances, has taken a small tentative step toward the more realistic remedies that are urgently needed. The Company, and the Chamber of Commerce, seeking to prevent any diminution of the present privilege of an ineffectual remedy enjoyed by bad faith bargainers, have sought to portray this minor improvement as a major punitive expedition in the hope that this Court will so restrict the Board that it will be powerless to undertake the necessary task of remedial reform. In light of the employer position taken here we believe it is important to place this case in sharper perspective in order to afford the Court the opportunity to make a sound evaluation of what is truly at stake. Our brief will be devoted to that end.

ARGUMENT

WHERE AN EMPLOYER REJECTS A CHECKOFF CLAUSE SOLELY TO FRUSTRATE AGREEMENT WITH THE UNION THE NLRB'S REMEDIAL AUTHORITY INCLUDES THE POWER TO ORDER ACCEPTANCE OF THAT CLAUSE

On October 5, 1961, the United Steelworkers were certified as the bargaining representative of the production and maintenance employees at H. K. Porter's Danville, Virginia, plant. It is beyond dispute, indeed H. K. Porter has not chosen to contest the point in this Court, that from that date through 1966 the Company failed to meet its bargaining obligation. For the purposes of the instant proceeding, the second against the Company, the §8(a)(5) violation stems from the fact that as a "harassment of the International Union" (A. 16) and in order to deny the Union "aid and comfort" (A. 36), the Company has refused to consider the question of a dues' checkoff clause in the manner mandated by the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.* "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor . . . it presupposes a desire to reach ultimate agreement." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485 (1960). The Company's own testimony

quoted above demonstrates that it was motivated by the antithesis of this desire; its "sole purpose," as the Board and the court below properly found, was to "frustrate agreement with the Union" (A. 135).

The foregoing makes it manifest that on the merits this is a simple case. It is now settled that the Act imposes a duty to bargain in good faith, *Insurance Agents*, 361 U.S. at 485; the live controversy concerning the scope of that duty is confined to the propriety of inferring bad faith from the parties' actions or bargaining positions, *see*, §8(d), *NLRB* v. *American National Insurance*, 343 U.S. 395 (1952). Here no such inferences were necessary since the Company's lack of good faith was proved out of its own mouth.

To remedy a §8(a)(5) violation committed by an employer "which has repeatedly flouted its Section 8(a)(5) duty" (A. 122), the Board and the court below ordered the Company to "grant to the Union a contract clause providing for the checkoff of union dues" (A. 135). The validity of this remedy is the basic question raised here. We shall now show that this remedial issue, like the now resolved issues relating to the merits, does not raise any substantial legal problem, and that the decision below is incontestably correct.

1. The Company, and the Chamber of Commerce, would have it that the remedy ordered here raises far-ranging questions about the meaning of §8(d) of the Act, the scope of "freedom of contract" in labor negotiations, and the vitality of this Court's decisions in *Insurance Agents* and *American National Insurance*. We most emphatically disagree. These characterizations distort the import of this case, and substitute emotion for reason, in an attempt to obscure the fact that the Board and the court below have done nothing more than follow the logic of well settled principles in light of the somewhat unusual facts presented.

Section 10(c) states that the Board upon finding a violation "shall issue . . . an order requiring [the respondent] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies

of this Act." An order to bargain directed at a respondent who has bargained in bad faith is the mandatory minimum required by both the provision authorizing orders directing a cessation of the illegal activity, and the provision authorizing orders directing affirmative action effectuating the policies of the Act. The objective of a remedial order is the "prevention of unfair labor practices by the employer in the future [and] the prevention of his enjoyment of any advantage which he has gained by violation of the Act." *National Licorice* v. *NLRB*, 309 U.S. 350, 364 (1940). "One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act" *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704 (1944).

A bargaining order is plainly necessary to carry out the remedial purposes of the Act as outlined in cases such as *National Licorice;* indeed, it is scarcely more than a tautological restatement of §10(c). In essence the Board's direction to grant the Union a checkoff clause, merely spells out the nature of the obligation imposed by its bargaining order under the circumstances. As the Board stated, those circumstances are that the Company: first, "has repeatedly violated Section 8(a)(5)"; second, "admittedly had no business reason for opposing the checkoff"; and third, that "its only reason for opposition [to the checkoff] was to frustrate agreement with the Union" (A. 135). After making these findings, the Board was faced with a choice between ordering the parties to discuss the checkoff once again from scratch or ordering the Company to agree. Only the latter alternative is sufficient to correct the violation. Anything less would not compel a complete cessation of the unfair labor practice—as we now demonstrate.

This is not a case in which an employer had a number of reasons for refusing a checkoff proposal, some of which were lawful and others which were not. In such a case an order to accept such a clause could not be equated with a simple order to bargain. For it cannot be denied that in that situation the employer's bargaining performance had not foreclosed the possibility that it could, consistent with the duty to bargain in good faith, refuse to agree.

In this case, on the other hand, the Company has placed itself in a situation where only acceptance of the checkoff clause could "purge the stain of bad faith that has already soiled its position" for only that action would be an acceptable "means of assuring the Board, and the court, that it no longer harbors an illegal intent" (A. 122). It has done so because of the fact that "its only reason for opposition [to the checkoff] was to frustrate agreement with the Union." Thus here the Company's sole reason for the refusal was an illegal one. Having advanced that reason, and that reason alone, in the original negotiations prior to this proceeding, it is now too late in the day for the Company to say that it wishes an opportunity to protect its interests through further bargaining. The Act is not so self defeating that it authorizes bargaining on a clean slate, and as if nothing had happened, after a finding of bad faith bargaining; it requires bargaining with "a desire to reach ultimate agreement" from the first. An employer who has a legitimate interest to protect has an obligation to make that clear at some point in the initial negotiations, *NLRB* v. *Truitt*, 351 U.S. 149, 152 (1959). "To suggest that in further bargaining the Company may refuse a checkoff for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66-67, n. 16).

This being so, in the instant case, as opposed to the hypothetical case involving a refusal of a checkoff proposal for a mixture of legal and illegal reasons, there can be no doubt that it is entirely proper to equate an order requiring acceptance of the checkoff with a simple order to bargain. For they are merely two sides of a single coin where the sole reason for refusing a proposal is an unlawful one. In sum, what we have here is an adaptation of a standard bargaining order, that does not go beyond the basic *rationale* or remedial philosophy of such orders, to a violation that is a variant of the normal run of §8(a)(5) violations. In *Phelps Dodge* v. *NLRB*, 313 U.S. 177, 194 (1941), this Court stated "Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these

policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to ends to the empiric process of administration." The Board's action here is an instance of the proper operation of that process.

2. The foregoing demonstrates that the Company, and the Chamber of Commerce, have wrapped themselves in the mantle of §8(d), and "freedom of contract," not to protect against a "punitive" remedy which goes beyond the exigencies of the violation, *see, Local 60 Carpenters* v. *NLRB*, 365 U.S. 651, 655 (1961), but in order to assure that the basic violation committed goes unremedied. In this respect, the employer arguments here are based on the same appreciation of the realities of industrial life, and the same remedial philosophy as the arguments rejected by this Court in cases such as *Franks Bros.* and *NLRB* v. *Gissel Packing*, 395 U.S. 575 (1969). This is not surprising for the negotiation of a first contract is an extension of the organizing process. A plant is not organized in any effective sense until the union which has won majority support is functioning as the employees' representative on a day-to-day basis. And "the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate" at earlier stages (A. 128).

The competition for employee support is a political contest, and as is true in politics generally, time is therefore of the essence. In the §8(a)(5) context moreover, *see, NLRB* v. *C&C Plywood*, 385 U.S. 421, 430 (1967), time is one-dimensional—delay in a Board certification or in the start of good faith bargaining inevitably works for the employer. For the union and the employees supporting it "there is a tide in the affairs of men, which, taken at the flood, leads on to fortune, omitted all the voyage of their life is bound in shallows and in miseries," Shakespeare, Julius Caesar, Act IV, Scene 3, and that flood is in the early stages of the campaign and not after years of litigation.

Most employees look at their union as a service organiza-

tion through which to meet pressing needs, not as the fulfillment of a platonic ideal. Organization is usually the result of a group feeling that bargaining is needed immediately, not that it would be pleasant to bargain in two years. A few years of frustration, and of failure to make any gains, inevitably results in weakening the desire for representation. This problem is accentuated by the fact that most unions have limited resources and cannot afford to maintain extensive contact with employees of an employer who will not bargain. Thus as this Court, and the Board, have both recognized, "the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organization activities, and discourages their membership in unions," *Franks Bros*, 321 U.S. at 704:

> "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face. . . . [Moreover] the bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1048, 1412-1413 (1958).

For this reason an anti-union employer recognizing the inherent appeal of organization, *see, NLRB* v. *Jones & Laughlin*, 301 U.S. 1, 33 (1937), and the fact that the building of a successful union works a peaceful revolution which threatens both his pocketbook, and the status he derives as sole master of the work place, is tempted to resort to unlawful measures to alleviate the threat. The crucial determinant in such an employer's final decision is, of course, the efficacy of the remedies provided. The optimum is a remedy which permits a rerun election or a rerun of bargaining after years of litigation essentially as if no violation had taken place. That is the goal pursued by employers in cases such as *Franks Bros.* and *Gissel* and that is the goal being pursued here.

In those cases the employers argued that it was beyond the Board's power to remedy coercive unfair labor practices which destroyed a union majority evidenced by authorization cards by a bargaining order, and that the only permissible remedy was a cease and desist order and a new representative election to be held after the effects of the employer's unfair labor practices had been dissipated. This Court rejected that argument, *Gissel*, 395 U.S. at 610-611:

> "If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' ... while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires." (footnotes omitted)

At first blush the Chamber of Commerce appears to be pursuing a somewhat different and more reasonable line than that taken by the Company. It notes (Chamber Br. 2-3) that "the invocation of a strong and effective remedy" is "obviously warrant[ed]" here and endorses, after a fashion, a series of proposals to alleviate the most blatant effects of delay (*id.* at 8-9). However, this is deceptive and the tactic is really the one this Court diagnosed in *Gissel*, 395 U.S. at 611-612:

> "The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read notices to employees during working time at the plant, or it can seek a court injunctive order under §10(j) (29 U.S.C. §160 (j) (1964 ed.)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' §7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an

> employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign." (footnotes omitted)

The rationale of the foregoing portion of *Gissel* is perfectly applicable in the instant case. As Professor Lesnick noted, in discounting the utility of rerun elections:

> "[T]he fact remains, that, in a regime where there has been just concern over the adequacy of the remedial scheme, the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt." Lesnick, *Establishment of Bargaining Rights Without An Election*, 65 Mich. L. Rev. 857, 862 (1967).

That is precisely the point here. To order rerun bargaining from scratch for an employer whose "sole purpose in refusing to bargain in good faith on the checkoff was to frustrate agreement with the Union" in the initial bargaining sessions is to allow the employer "to profit from [his] own wrongful refusal to bargain" *Franks Bros.*, 321 U.S. at 704.[1]

[1] Two additional points should be made concerning Section II of the Chamber of Commerce Brief. First the attempt therein to prove that it is generally recognized that rerun bargaining from scratch, or rerun bargaining augmented in certain specified ways is adequate to cope with the violation committed in this case will not bear inspection. It is plain that the passage quoted (Chamber Br. 7) from a speech by Board General Counsel Ordman has nothing to do with remedies; it refers to the genius of good faith collective bargaining for solving difficult industrial problems. Moreover, the bits and scraps collected from Prof. Ross's study by the Chamber cannot obscure his basic conclusion: "The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act" (A. 127).

Second, the Chamber's invocation of the contempt power (Chamber Br. 9-10) is pure sophistry. This case involves the question of whether in light of the circumstances anything less than a grant of the checkoff is compliance with the duty to bargain and with the Board's order. The availability of contempt turns on the resolution of that question. Thus the Chambers argument is simply a device to evade the critical problem posed, *compare*, *FTC* v. *Morton Salt*, 334 U.S. 37, 54 (1948).

3. In *Gissel* the employers relied on §9(c) and a conception of "employee free choice" they claimed was entailed by that Section in their attempt to defeat a meaningful remedy; in the instant case they rely on the non-concession proviso to §8(d) and a conception of "freedom of contract" they claim is entailed by that proviso with the same end in view. Their reliance on §8(d) here is as unsound as their reliance on §9(c) in *Gissel*.

No one, so far as we know, questions the proposition that the statutory plan embodied in the Act is for free collective bargaining, "unrestricted by any governmental power to regulate the substantive solution of [the parties] differences" *Insurance Agents*, 361 U.S. at 488, as long as the employer and the union bargain in good faith. The essence of the Company's argument here goes one step further. It proceeds from the premise that in light of this plan an employer who has bargained in bad faith, as well as one who is bargaining in good faith, is immune from government regulation, of a remedial nature, which limits "freedom of contract" to any degree.

Thus, the Company's view is that its freedom from government dictation in bargaining is absolute and indefeasible. Properly understood, however, the Act protects the right of "freedom of contract" only as long as the party claiming that right has bargained in good faith. The basic policy of the Act is the encouragement of free good faith collective bargaining, not free collective bargaining *simpliciter*. The language of §8(d) itself makes this clear. It requires the parties "to meet . . . and confer in good faith." The non-concession provision of the statute is a proviso to that definition of the collective bargaining obligation. Plainly, then, one who defaults in his basic duty to bargain cannot claim the protection of that proviso; it is inapplicable in terms in the context of bad faith bargaining. This being so the Board's remedial powers in a bad faith bargaining case are not limited by the non-concession proviso to §8(d). The relevant policies of the Act the Board is empowered to effectuate by §10(c) in cases involving §8(a)(5) violations includes the encouragement of good faith collective

bargaining, *see* §1, not the protection of an absolute right of "freedom of contract."

The utterly barren nature of the Company's position is most clearly delineated by comparing the role of "freedom of contract" and freedom to hire and fire at will under the Act. In *Jones & Laughlin*, 301 U.S. at 45, this Court, after reviewing the legislative history, concluded that "The Act does not compel agreement between employers and employees," and in the companion case of *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937), the Court went on to note "The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent [employee]." Freedom of contract under the Act is not, of course, unlimited. The parties are required to bargain in good faith; §8(d) cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail" *NLRB* v. *Herman Sausage*, 275 F.2d 229, 232 (CA 5th Cir., 1960). By the same token "the employer may not under cover of . . . the right . . . to select its employees or discharge them . . . intimidate or coerce its employees with respect to their self organization and representation. . . ." *Jones & Laughlin*, 301 U.S. at 45-46.

Thus these two rights are parallel in substantive terms: the employer can agree or refuse to agree, hire or refuse to hire, as he sees fit as long as he does so for lawful reasons. In the hiring context it was quickly settled that once the employer was found to have acted for an improper motive he could not rely on the Act's policy against government dictation of employment decisions. The critical case was *Phelps Dodge*. There the Court was faced with the question of whether an employer could be required to offer jobs to employees whom he had for illegal reasons refused to hire. In the first instance the employer would have been free to refuse to hire the men absent discrimination. The problem was whether the remedy should be limited to an order to cease discriminating, and a direction to the employer to consider the application for employment anew, or whether an order to employ the discriminatees with back pay was called for:

> "Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under §8(3), 29 USCA §158(3), the remedial authority of the Board under §10(c), 29 USCA §160(c), became operative. Of course it could issue, as it did, an order 'to cease and desist from such unfair labor practice' in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?
>
> Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized,' National Labor Relations Bd. v. Mackay Radio & Teleg. Co., 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative action' which 'will effectuate the policies of this Act.'" *Phelps Dodge*, 313 U.S. at 187-188.

It is our view that the *rationale* of *Phelps Dodge* is dispositive of this case. The refusal to hire is a variant of the simple discriminatory discharge, just as the refusal to consider a proposal solely to frustrate agreement is a variant of the simple refusal to recognize. *Phelps Dodge* demonstrates that §10(c) reaches such unusual "stratagems for circumventing the policies of the Act" (313 U.S. at 194) as well as their more conventional analogues. Thus an employer who bargains in bad faith is no more entitled to complete enjoyment of "freedom of contract" than an employer who discriminates is entitled to the complete enjoyment of the freedom to hire and fire. Where the sole purpose of the violation is the destruction of the employees' statutory rights, the interest in providing a remedy that "will dissipate the unwholesome effects of violations of the Act" *Franks Bros.*, 321 U.S. at 704 requires that the employer claiming these privileges be estopped. In *Fibreboard Paper Products* v. *NLRB*, 379 U.S. 203, 217 (1964), this

Court noted that the proviso to §10(c) which prohibits the Board from ordering reinstatement of, or back pay for, an "individual . . . suspended or discharged for cause" was designed to protect only employers whose employment decisions are properly motivated and that it does not "curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice." It follows that the proviso to §8(d), which is not even addressed to the Board's remedial powers, is similarly restricted in that it does not protect an employer who has failed to bargain in good faith. This does not open one who has bargained in bad faith to punitive remedies. In this area as in all others, the Board must show that its order is "a reasonable attempt to put aright matters the unfair labor practice set awry" *Local 60 Carpenters*, 365 U.S. at 658 (Harlan, J., concurring). As we have shown, pp. 3-6, *supra*, the requirement that the Company grant the check-off here meets that test comfortably.

4. In the Section of its brief entitled "Interest of the Amicus Curiae" and Section IV (pp. 1-2, 12-13), the Chamber of Commerce indicates that it is primarily concerned with this case as a vehicle for developing law that will inhibit changes in the present remedies for §8(a)(5) violations being considered in four cases pending before the Board, *Ex-Cell-O, et al.*, NLRB Case Nos. 25-CA-2377, *et al.* The remedy being sought in *Ex-Cell-O* is sound as we shall show. Thus a comparison to *Ex-Cello-O* does not detract from this case. Such a comparison is however unsound as a matter of fact. The legal issue raised here, the scope of the limitation, if any, imposed on the Board's remedial powers by §8(d), is irrelevant to the issues raised in *Ex-Cell-O*.

In *Ex-Cell-O*, a compensatory remedy to make employees whole for the lost opportunity to bargain collectively which follows a §8(a)(5) violation is being sought. The argument in favor of that remedy may be simply stated:

First, as Congress recognized in §1 of the Act, the available relevant data indicate that the opportunity to bargain collectively is a valuable right. Where there are no unfair labor practices, the average unit of employees which has

opted for unionization has a very high expectancy, approaching a certainty, of monetary gain through collective bargaining. Second, under §8(a)(5), an employer's refusal to bargain with employees who have properly demonstrated their desire for collective bargaining is an illegal impairment of that right and may properly be said to be the legal cause of the ensuing loss. Third, the courts have long recognized that impairment or destruction of an opportunity having an ascertainable monetary value is a valid basis for providing compensatory relief, *see, e.g., Bigelow* v. *R.K.O. Radio Pictures*, 327 U.S. 251, 265-266 (1946); *Chaplin* v. *Hicks* [1911] 2 K.B. 786. Fourth, the Board's power to effectuate the policies of the Act by providing compensatory relief is equal to that of the courts. Finally, the present system tempts the rational man to violate the law. For both common sense, and empirical data indicate that immediate collective bargaining at the point mandated by law will probably result in a contract which raises an employer's wage bill. Defiance on the other hand will almost surely lead to a hiatus of two years or more during which there will be no bargaining. At the present time, this hiatus provides the employer with a short-term saving if that is his desire. It also, for this reason, inevitably results in a weakening of the employee's desire for union representation at the time the employer finally is forced to go to the bargaining table, *see*, pp. 6-7, *supra*.

The basic conclusion we draw from the foregoing is that a compensatory remedy is needed. Given the strength of the case for that remedy, and the weakness of the case against it, we can well understand the desire among employers to pretermit affirmative Board action in *Ex-Cell-O* through the §8(d) argument advanced here. However, there can be no doubt that the compensatory remedy sought from the Board is absolutely unrelated to "freedom of contract" either as the Company and the Chamber of Commerce understand that concept, or as we have defined it.

If the Board were to award compensation for the lost opportunity to contract, it would by no means be writing a contract for the parties. The pertinent analogy is the law of

damages which awards compensation for the loss of earning capacity due to a tort, *see, Bigelow* v. *R.K.O. Radio Pictures*, 327 U.S. at 265-266. That law is not based on the assumption that the plaintiff would have earned profits except for the injury, but only on the assumption that he might have done so. This point is repeatedly emphasized in the authorities. As stated in the Restatement of Torts, §924, p. 633:

> "It is immaterial that the plaintiff would not have worked during the period of incapacity if he could have worked. In such case his earning capacity was hurt whether or not he would have chosen to exercise it and he is entitled to damages measured by the extent to which his capacity for earning has been reduced."

The measure of damages for impairment of earning capacity "is not what plaintiff would have earned but what he could have earned." 3 Frumer, *Personal Injury*, 128.

Thus, in making the employees whole for the denial of their opportunity of collective bargaining and the reasonable expectancy of resulting earning increments, the Board would not be purporting to restore them to the condition which would have obtained but for the employer's violation of the statute, nor writing any contract to that end. It would be merely making them whole for the wage gains which they reasonably might have achieved had their rights been respected. Far from writing a contract for the parties, the Board would be simply making the workers whole for the injury caused when they were denied a statutory right which our labor relations experience demonstrates to have actual monetary value. The wrong which the Board would be redressing is not the denial of a right to a contract but the right to bargain collectively in pursuit of a contract.

The remedy sought would not impose new terms and conditions of employment on the parties by Board fiat; the affected employees would receive a single payment for the period during which the employer wrongfully refused to bargain; the day when the employer begins to bargain the period for computing his liability would end and this would be true even though no contract ever resulted; moreover, for the purposes of the ensuing bargaining, the employees' wage rates as of the day bargaining begins would not be

their previous wage rate plus the additional amount representing the improved benefits they could have won in collective bargaining but simply their previous wage rates alone. All of the foregoing makes it clear that the Board is not being asked in *Ex-Cell-O* to use its power to set new terms and conditions of employment or to influence future settlements, but only to make the employees whole for the period during which they were wrongfully denied their valuable right to collective bargaining.

The short of the matter is that this case presents a limited issue which should be decided on its merits, rather than being obscured by the unrelated issues of greater moment raised by other cases.

CONCLUSION

For the foregoing reasons, as well as those stated by the United Steelworkers of America and the National Labor Relations Board, the decision below should be affirmed.

Respectfully submitted,

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